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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOEY RANDOLPH TONEY, Defendant and Appellant.	F044287 (Super. Ct. No. 03CM1153) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

On April 30, 2003, appellant Joey Randolph Toney was charged in an information with possession of cocaine for sale (Health & Saf. Code, § 11351, count one), possession

[*]Before Dibiaso, Acting P.J., Vartabedian, J., an d Harris, J.

of cocaine (Health & Saf. Code, § 11350, subd. (a), count two), and unlawfully resisting peace officers (Pen. Code, § 148, subd. (a), count three). The information included enhancements for a prior qualifying narcotics conviction (Health & Saf. Code, § 11370.2, subd. (a)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court denied Toney's suppression motion on September 12, 2003.

The court gave Toney the *Boykin*/*Tahl*[1] admonitions and advised him as to the other relevant consequences of his plea. The court admonished Toney that one consequence of his plea would be that he faced a total prison term of five years which included a three-year term on the principal offense plus two additional years for each enhancement. This included a second advisement that Toney's maximum prison sentence could be five years. In taking Toney's plea, the trial court obtained admissions from Toney that he possessed 13 grams of cocaine base and Toney's possession of cocaine base was a usable quantity.

Pursuant to a plea agreement, Toney pled guilty to count two, admitted the two prior prison term enhancements, and agreed he was ineligible for Proposition 36. In exchange for Toney's plea, the trial court dismissed the remaining allegations. The trial court sentenced Toney to prison for a three-year upper term on count two and added two one-year consecutive terms for each enhancement for a total prison term of five years.[2]

Toney's appointed appellate counsel originally filed an opening brief which summarized the pertinent facts, raised no issues, and requested this court to

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[1] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

[2] The trial court found four aggravating factors, which were also listed in the probation report: (1) the crime involved a large quantity of contraband; (2) the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness; (3) the defendant was on parole when the instant offense was committed; and (4) the defendant's prior performance on probation or parole was unsatisfactory. The trial court did not use a fifth aggravating factor set forth in the probation report, that Toney had prior prison sentences.

independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter on March 9, 2004, we invited Toney to submit additional briefing. Toney responded with a letter listing several issues. We have considered these issues and find them to be without merit.

On September 1, 2004, Toney's appellate counsel filed a letter contending that the trial court imposition of the upper term on count two violated Toney's constitutional rights as set forth in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466.[3] We will find that the trial court did not violate Toney's constitutional rights in imposing the upper term for his conviction.

DISCUSSION

We reject Toney's contention that the trial court's selection violates his constitutional rights because Toney admitted at least one of the aggravating factors when he pled guilty to possession of a narcotic and the principle of estoppel should be applied to his plea bargain.

A. Appellant's Admission

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose based solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." "In other words, the relevant 'statutory maximum' is not the maximum sentence the judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 542 U.S. ___, ___, [124 S.Ct. 2531, 2537].) Thus,

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[3] On December 13, 2004, we invited the parties to submit additional supplemental briefing. Neither party has responded.

when a sentencing court's authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts.

In setting forth a factual basis for Toney's guilty plea, the trial court obtained an admission from Toney that he possessed 13 grams of cocaine base and that this quantity of the narcotic was usable. The probation report noted that the offense involved a large quantity of contraband, an aggravating factor. The trial court, without any objection by Toney, found that Toney's possession of a large quantity of contraband was an aggravating factor. We acknowledge that Toney did not per se admit that his possession of 13 grams of cocaine base was a "large quantity" of contraband. Toney's admission, however, was that he in fact possessed 13 grams of contraband. The trial court's conclusion that this was a large quantity for sentencing purposes was a legal conclusion based on the admission of the essential fact by the defendant.

We find nothing in *Blakely* setting any threshold of formality for a defendant's admission. *Blakely* acknowledged that *Apprendi* could be satisfied in a guilty plea context if the defendant "either stipulates to the relevant facts or consents to judicial factfinding." (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2541].) *Apprendi* relied on the earlier decision of *Almendez-Torres v. United States* (1998) 523 U.S. 224 which allowed a higher sentence to be imposed based on the defendant's admission of three prior convictions. *Apprendi* noted that among the reasons for allowing a sentence to be based on such facts were that the prior convictions "had been entered pursuant to proceedings with substantial procedural safeguards of their own." (*Apprendi*, *supra*, at p. 488.) None of these cases require the admission itself to be accompanied by procedural safeguards so long as safeguards were provided in the prior conviction.

Aggravating factors, like sentencing enhancements, are viewed in *Apprendi* to be the functional equivalent of elements of a greater offense. (*People* v. *Sengpadychith* (2001) 26 Cal.4th 316, 326.) It is established that judicial advisements pursuant to

Boykin/ Tahl are not required when a defendant does not plead guilty but merely stipulates to an element of an offense. (*People v. Newman* (1999) 21 Cal.4th 413, 422; *People v. Adams* (1993) 6 Cal.4th 570, 577.) Toney's admission to the quantity of narcotic came after he received complete *Boykin*/*Tahl* admonitions.

There were four other aggravated factors in the instant action. There were no mitigating factors noted in the probation report. Regardless of whether all of the recidivist related factors the court utilized fell within the prior conviction exception, however, one valid factor in aggravation is sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433). We find *Blakely* inapplicable to the facts of the instant action.

B. Estoppel

Plea bargaining is a judicially and legislatively recognized procedure that provides reciprocal benefits to the People and the defendant. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; *People v. Orin* (1975) 13 Cal.3d 937, 942; Pen. Code, § 1192.5.)

A defendant may be estopped from complaining about a sentence, even if it is unauthorized, if the defendant agreed to it as part of a plea agreement. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) When a defendant contends that the trial court's sentence violates rules that would have required the imposition of a more lenient sentence, but he or she avoided a potentially harsher sentence by entering into the plea bargain, the court will imply that the defendant waived any rights under such rules by choosing to accept the plea bargain. (*Ibid.*) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid.*)

Toney pled guilty to one offense and, in return, one felony and one misdemeanor offense were dismissed. The prosecution also dropped an enhancement for a prior qualifying narcotics conviction which had a three-year term. The felony offense, possession for sale of a controlled substance, had an upper term one year greater than the

upper term for mere possession of a controlled substance. Toney avoided a harsher sentence by entering into the plea agreement. Toney is not a novice to criminal proceedings. He has a lengthy criminal record as both a juvenile and as an adult. Toney received the sentence for which he bargained. Under these circumstances, we find that Toney's attempt to obtain a better bargain through the appellate process is trifling with the courts.[4]

DISPOSITION

The judgment is affirmed.

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[4] In light of our ruling, we do not decide whether the trial court's imposition of the upper term was harmless error in light of the remaining three aggravating factors.